12 January 2024

Guidance

The Provider Selection Regime

1 Introduction

1.1 This guidance note sets out some of the key issues to consider when making purchases relating to clinical NHS healthcare services, under the Health Care Services (Provider Selection Regime) Regulations 2023 (the "**PSR**"), in force from **1 January 2024**.

2 Background

2.1 Since April 2016, the procurement of NHS healthcare services has been regulated by the "light touch regime" of the Public Contracts Regulations 2015 ("**PCR 2015**"); this implemented the requirements of the 2014 EU public procurement directive. While the light touch regime does allow commissioners of NHS healthcare services to apply a higher value threshold than that which applies to standard services contracts, and to opt for certain flexibilities in the way a light touch procurement process is run, it still requires a fully competitive process to be run for these contracts.

2.2 Brexit has presented the opportunity to move away from the requirements of EU public procurement law; from autumn 2024 we expect the Procurement Act 2023 to come into force, replacing the PCR 2015. In relation to NHS commissioning, the Health and Care Act 2022 provided for the PSR regulations to be made to address how NHS healthcare services should be procured.

2.3 The PSR comes into force on **1 January 2024** and allows for these services to be procured without a fully competitive process being run in certain circumstances. This note discusses these in more detail.

3 Interplay of the PSR with the light touch regime in the PCR 2015/Procurement Act 2023

3.1 Both the PCR 2015 and the Procurement Act 2023 contain a list of light touch regime services, which includes CPV codes for various clinical health services.

3.2 Notwithstanding this, from 1 January 2024, the PCR 2015 are amended to remove NHS healthcare services from their scope. The Procurement Act 2023 also contains a provision allowing NHS healthcare services to be removed from its scope once it comes into force.

3.3 The effect of this is that **all NHS healthcare services must be procured using the PSR from 1 January 2024**.

4 Transitional Provisions

4.1 According to Regulation 29, the PSR is not intended to have retrospective effect but any modifications to contracts or framework agreements which fall after 1 January 2024 will need to comply with the PSR.

4.2 The PSR does not affect:

4.2.1 any contract award procedure commenced but where the award was not made, before 1st January 2024;

4.2.2 the conclusion of any framework agreement where the procurement process commenced, but where the framework agreement was not concluded, before 1st January 2024; or

4.2.3 the use of a dynamic purchasing, or similar, system which is not a framework agreement (whether or not the system is operated in accordance with Regulation 34 of the Public Contracts Regulations 2015) where the period of validity has not expired and the system has not otherwise been terminated.

4.3 A contract award procedure is regarded as having already "commenced" if:

4.3.1 a contract notice has been submitted for e-notification;

4.3.2 the relevant Authority has contracted any provider to seek expressions of interest or offers in respect of a proposed contract or respond to an unsolicited expression of interest or an offer has been received from that provider in relation to a proposed contract; or

4.3.3 any steps have been taken with a view to making an award.

5 To which services will the PSR apply?

5.1 The PSR will apply to healthcare services in England. A comprehensive list of the services covered, which are distinguished by their Common Procurement Vocabulary (CPV) codes, can be found at Schedule 1 to the PSR regulations.

5.2 Generally, the PSR will apply to healthcare services, such as primary care, eye care, cardiology, rehabilitation, hospital and related services, and ambulance services.

5.3 It will not apply to goods, works, non-healthcare services or healthcare adjacent services such as business consultancy, administration or catering, which are not directly related to a patient's healthcare.

5.4 As such, Authorities must be clear in their specification to ensure it is covered by the PSR.

5.5 Where there is a mixed procurement, where the contract covers a mix of healthcare and non-healthcare or healthcare adjacent services, an Authority should carefully consider the main subject matter of the contract with reference to the value over the lifetime of the contract. If the main subject matter of the contract, i.e., over 50% of the value of the contract, is comprised of healthcare services, the contract will be covered by the PSR. It is however important to consider (and record) whether non-healthcare services could be provided under a separate contract and, if not, why they should be provided together, to justify coverage by the PSR. Authorities should be able to produce an audit trail which clearly sets out this reasoning.

6 The Five Routes to Awarding Contracts

6.1 Direct Award A

6.1.1 Direct Award A is used in the circumstances that the services can only be provided by the existing provider and there is no realistic alternative. This is detailed more thoroughly in Regulation 7.

6.1.2 To use Direct Award A, the service must be an existing service provided by an existing provider, the Authority must be satisfied that those services can only be provided by that provider, and the service must not be a framework.

6.1.3 The types of services covered by Direct Award A are likely to be essential services provided by NHS Trusts under the Standard Contract, such as 999 emergency ambulance services and NHS urgent mental health crisis services.

6.1.4 To award a contract under Direct Award A, the Authority must publish notice of the award within 30 days of the award (that is, the signing of the contract). The requirements of a valid notice are set out in Schedule 2.

6.2 Direct Award B

6.2.1 Direct Award B is used where the patient has a choice of provider and there is no restriction on provider numbers. Direct Award B must be used if the following circumstances apply:

(i) the health care services are ones where patients get a choice of provider (either because the relevant Authority has decided to offer patients a choice or because there is a legal obligation to offer choice);

(ii) there is no restriction on the number of providers;

(iii) contracts are offered to all providers who meet all requirements for delivering the services in question;

(iv) steps have been taken to make providers aware of these contracts and of how to express an interest; and

(v) it is not a framework.

6.2.2 The award process is the same as that for Direct Award A, above.

6.3 Direct Award C

6.3.1 Direct Award C is used where the Authority intends to continue working with an **existing** provider.

6.3.2 The conditions for Direct Award C are:

(i) the Authority is not obliged to use either Direct Award A or B;

(ii) there is an existing contract which is about to expire, and a subsequent contract must replace it;

(iii) the considerable change threshold is not met; this test **will** be met where:

(A) new arrangements significantly change the nature of the contract from when it was first entered into;

(B) if there are no material changes to the contract, the lifetime value of contract is considered – if it is at least either:

1) £500k higher; and

2) 25% higher,

then Direct Award C route is not available, and the Authority must use either the Most Suitable Provider or Competitive Process. It is worth noting that some exclusions do however apply, which are detailed at Regulation 6;

(iv) The Authority believes, taking in account the Key Criteria and applying the Basic Selection Criteria (see below for these) that the incumbent is satisfying the requirements of the existing contract and this will continue under the new contract; and

(v) it is not a framework agreement.

6.3.3 To award a contract under Direct Award C, the Authority must publish a notice of intention to award as well as the confirmation of award required in Direct Award processes A and B.

6.3.4 The Key Criteria are set out at Regulation 5 (and detailed at Annex D of the Statutory Guidance):

(i) quality and innovation;

(ii) value;

(iii) integration, collaboration and service sustainability;

(iv) improving access, reducing health inequalities and facilitating choice; and

(v) social value.

The Authority should record in the decision-making record for the relevant process the reasons why it favours some of the criteria above over others. It must ensure it continues to comply with its obligations under existing legislation and statutory and NHS guidance outside of the PSR.

6.3.5 The Basic Selection Criteria are not prescribed but must be decided by the Authority, they may relate to the selection criteria under the PCR 2015, i.e.:

(i) suitability to carry out a specific activity (obviously one which is in relation to the contract)

(ii) economic and financial standing, and

(iii) technical and professional ability,

(see Regulation 19 and Schedule 16 for more detail)

6.4 Most Suitable Provider

6.4.1 The Most Suitable Provider route may be used where an Authority believes it can identify the most suitable provider, taking into account the 'likely providers' and all information available at the time.

6.4.2 It may be followed provided there is no obligation to use Direct Award A or B and the conditions allowing use of Direct Award C are either not met or they are met but the Most Suitable Provider route is preferable to the Authority.

6.4.3 The guidance urges Authorities to carry out 'pre-market engagement' to ensure more efficient outcomes.

6.4.4 To award a contract under Most Suitable Provider, the Authority must:

(i) notify providers of its intention to use this process. Schedule 5 does not stipulate that authorities must expressly invite providers to get in touch or how to do so but if they do, providers need to be taken into consideration by the Authority;

(ii) wait 14 days after the notice is published, within which providers may respond to the notice. The Authority is not permitted to take any steps towards identifying potential providers until 14 days after the day on which it published the relevant notice, however this is not a standstill period;

(iii) take into account any provider that responded to the notice about the intention to follow this process;

(iv) identify potential providers with reference to the key criteria and basic selection criteria; and

(v) identify the most suitable provider and publish notice of its intention to award. Subject to no representations being made by unsuccessful providers, the contract can be awarded at the end of the standstill period.

6.4.5 The necessary notices for the Most Suitable Provider process are:

(i) intention to use the MSP process;

(ii) intention to award; and

(iii) confirmation of award.

6.5 Competitive Process

6.5.1 The Competitive Process may be used where the other processes do not apply.

6.5.2 To award a contract under the Competitive Process, the Authority must:

(i) decide on the award criteria;

(ii) consider the Key Criteria and the Basic Selection Criteria (as above);

(iii) publish a notice seeking offers (the requirements of this notice are in Schedule 8). The competition may be broken down into stages but the Authority must state this in its Schedule 8 notice. The stages are not prescribed; it is possible for commissioners to use, for example, the restricted procedure under the PCR 2015; and

(iv) assess offers and notify the winning provider of its success. Unsuccessful providers must be given the information set out in Schedule 9, such as the reasons why the successful provider won and the reasons why the unsuccessful provider did not. 'Relative advantages and characteristics' need not be considered as under the PCR 2015.

6.5.3 Notices are important to the collaborative process as they improve transparency. Transparency notices are to be published on the government's Find a Tender website. We expect notice templates are to be developed but for the time being, an Authority will need to adapt the notices which are already available.

6.5.4 The necessary notices are:

(i) a notice of intention to award – this triggers the standstill period (see below); and

(ii) confirmation of award.

7 Standstill and representations from suppliers

7.1 Under Regulation 12, a standstill period is required where any of Direct Award C, Most Suitable Provider, or a Competitive Process is being followed.

7.2 The standstill period begins the working day after publication and lasts for a minimum period of eight (8) working days. If no representations are made by suppliers to the Authority during the standstill period, the contract can be entered into.

7.3 Unlike under the PCR 2015, while a supplier may make representations to the Authority during the standstill period, under the PSR there is no "automatic suspension" process to mirror that under the PCR 2015.

8 Useful Links

The Health Care Services (Provider Selection Regime) Regulations 2023 (legislation.gov.uk)

NHSE The Provider Selection Regime: final statutory guidance (dated 8 January 2024)

NHSE PSR Practitioner Slide Deck (updated January 2024)

NHSE PSR Toolkit Products

Direct Award Process A: end to end process map

Direct Award Process B: end to end process map

Direct Award Process C: end to end process map (as updated January 2024)

Most Suitable Provider Process: end-to-end process map (as updated January 2024)

Competitive Process: end to end process map (as updated January 2024)

Contract Modifications: end to end process map (as updated January 2024)

Urgent Circumstances: end to end process map (as updated January 2024)

Guidance re completing FTS notices for PSR (updated January 2024)

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